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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1496

LOCAL 203, GRAPHIC ARTS INTERNATIONAL UNION, AFL-CIO,

Petitioner,

vs.

THE COLONIAL PRESS, INC. and the NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

IRVING M. KING,
ROBERT H. NICHOLS,
RUSSELL WOODY,
One IBM Plaza,
Chicago, Illinois 60611,
Attorneys for Petitioner.

Of Counsel:
COTTON, WATT, JONES, KING & BOWLUS,
One IBM Plaza,
Chicago, Illinois 60611.

Gunthorp-Warren Printing Company, Chicago • 346-1717 56

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LOCAL 203, GRAPHIC ARTS INTERNATIONAL UNION, AFL-CIO,

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vs.

THE COLONIAL PRESS, INC. and the NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner, Local 203, Graphic Arts International Union, AFL-CIO, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered in *National Labor Relations Board et al.* v. *The Colonial Press, Inc.* on February 28, 1975.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit, Judge Lay dissenting, is reported at 509 F. 2d 850 and is reproduced as Appendix A hereto, *infra*, pp. A1-15. The Order, by an evenly divided Court, denying the Petition for Rehearing and Suggestion for Hearing En Banc, is not reported

but is reproduced as Appendix B hereto, *infra*, p. A16. The Decision and Order of the National Labor Relations Board is officially reported at 207 NLRB (No. 14) (1973) and is reproduced as Appendix C hereto, *infra*, pp. A17-46.

JURISDICTION.

The denial of the Petition for Rehearing and Suggestion for Rehearing En Banc was entered on February 26, and the Judgment of the Court of Appeals was entered on February 28, 1975. Jurisdiction of this Court is conferred by 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Must a lawfully discharged former employee who receives an offer of reemployment during the course of an unfair labor practice strike, which offer thereby rescinds or excuses his prior discharge, formally and contemporaneously accept that offer, particularly when it is conditioned in such a fashion that the employee must thereby become a strikebreaker and give up rights protected by Section 7 of the Act,[1] 29 U. S. C. § 157, in order to be entitled to reinstatement following an unconditional offer to return to work at the end of the strike? Stated otherwise, may an employer avoid his obligation to reinstate at the conclusion of an unfair labor practice strike by extending during the course of strike offers of reemployment containing an unlawful condition, namely, a requirement that the employee cross the picket line and become a strikebreaker in order for the offer to be effective, which offer the employee fails to accept?

2. If an employee is in fact required to formally accept an offer of reemployment in order to regain the status of an employee entitled to the protection of the Act at the conclusion of an unfair labor practice strike, should not continued partici-

1. The National Labor Relations Act, as amended, 29 U. S. C. Section 141, et seq. All statutory references in this Petition are to this statute, which will be referred to herein as "the Act".

pation in the strike, following such an offer, constitute such acceptance?

STATUTES INVOLVED.

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other mutual aid or protection . . . , 29 U. S. C. § 157.

Section 8(a). It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . , 29 U. S. C. § 158(a)(1) and (3).

STATEMENT OF THE CASE.

Background.

The Colonial Press, Inc. (hereinafter "the Company") is a commercial printing firm in Omaha, Nebraska. The present case involves an unfair labor practice strike, commencing on August 23, 1972, by employees of the Company represented by Local 203, Graphic Arts International Union, AFL-CIO (hereinafter "the Union"), the duly certified collective bargaining representative, the conduct of Company representatives during the course of that strike, and the propriety of the Company's refusal to reinstate six employees (Messrs. Sass, Baker, Birdsong, Louden, Classen and Blenden) in February 1973 following an unconditional offer of return to work made by the Union on their behalf.

On one or more occasions during the month of August, 1972, the Union, because it felt the Company was manipulating its

work schedules to interfere with the Union's ability to communicate with its members concerning negotiations, conducted meetings among unit employees during regularly scheduled working hours. The six employees named above were discharged for absenting themselves from work to attend these meetings. The Regional Director of the National Labor Relations Board (hereinafter "the Board") declined to issue a complaint against the Company on charges which the Union filed asserting that discharges violated the Act, and his determination was upheld on appeal to the Board's General Counsel.

Notwithstanding this fact, it was and is the Union's view that by making numerous offers of employment to the six men during the course of the unfair labor practice strike, the Company essentially forgave or rescinded the prior discharges or condoned their prior misconduct, and therefore was obligated under applicable law to reinstate them to their former positions at the end of the strike. When the Company refused to do so, unfair labor practice charges were filed by the Union, and a complaint was issued by the Board alleging that by failing to reinstate these and other former employees the Company violated Sections 8(a)(1) and (3) of the Act.

Proceedings Before the Board.

Following a hearing, the Administrative Law Judge issued his Decision. Insofar as the issue here is concerned, he held:

> . . . [T]hat Swoboda, Nice, and the other supervisors who spoke to the pickets . . . were soliciting them to return to their jobs in order to break the strike. Whether or not the men were told that their return was conditioned on abandonment of the Union is not too important. The reality is that Respondent and the strikers and pickets undoubtedly knew their return to work during the strike meant renunciation of the Union in fact. I find that Respondent clearly indicated to the pickets, including those who had previously been discharged for cause, that they would be reemployed if they requested it. (App. C, pp. A37-38.)

In rejecting the notion that they must be reinstated, however, the Administrative Law Judge reasoned as follows:

> General Counsel argues that since Respondent offered all the pickets employment, all of them became unfair labor practice strikers entitled to reinstatement on application. Although I have found that offers of employment were made, I must reject General Counsel's contention because the offers were never accepted . . . [While] Respondent forgave their misconduct by clearly indicating that they were employable, . . . it is something else to say that by virtue of the doctrine of "condonation", nonemployees became striking employees . . .
>
> . . . [I]t should take more than "condonation" or an unaccepted offer of employment to turn a dischargee into a striker and then into an unfair labor practice striker entitled to reinstatement, upon application, even if replacements legally hired must be discharged. (App. C, pp. A38, 41.)

The matter then was appealed to the Board, which declined to adopt the Decision and Recommended Order of the Administrative Law Judge on this issue.[2] Instead, the Board held that the Company's refusal to reinstate these men in February, 1973 in fact violated Sections 8(a)(1) and (3) of the Act and ordered the Company to grant immediate reinstatement.

Characterizing the issue as one of "whether the six persons found to have been lawfully discharged became . . . entitled to the reemployment rights normally accorded to unfair labor practice strikers, or whether they continued throughout the series of events herein to be dischargees having an insufficient nexus of employment with Respondent to be considered unfair labor practice "strikers", the Board found, as had the Administrative Law Judge, "unmistakable offers of reemployment and clear evidence of condonation by Respondent of the misconduct which had given rise to the earlier lawful discharges". It there-

2. Pursuant to the provisions of Section 3(b) of the Act, 29 U. S. C. § 153(b), the Board delegated its authority in the matter to a panel consisting of the then-Chairman Miller and Members Fanning and Penello.

offers of reemployment were not unconditional, but that they were in fact conditioned on acceptance of "the Company's terms —one of the terms being that persons accepting employment would work and not merely picket" (App. A, p. A9). The majority found no acceptance of this offer, and specifically declined to adopt the view that continuing participation in the unfair labor practice strike manifested acceptance of the Company's offer. Although not expressly stated, the majority apparently was of the view that only a return to work (i.e. only crossing the picket line and becoming a strikebreaker), would suffice, observing that "no 'incantation of carefully constructed legal pharases', to use the Board's language, is needed for a worker to manifest a willingness to work" (App. A, p. A9).

Judge Lay dissented, pointing out that the inevitable consequence of the majority's opinion is to require a former employee who has been lawfully discharged to accept "an illegal condition that they denounce the Union and their protected rights under the Act" as the only method of gaining reemployment (App. A, p. A14). This result he flatly rejected, finding acceptance, if necessary, in the continued participation in the unfair labor practice strike, a legitimate employee function.

Following the court's decision, the Union filed a Petition for a Rehearing and Suggestion for Rehearing En Banc. On February 26, that Petition was denied by an evenly divided court. Judges Lay, Heaney and Bright voted to grant the Petition, and Judge Ross took no part in the consideration of it. (App. B, p. A16.)

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view that once the offer was made, employee status was restored. It was not in any event prepared to enforce the illegal condition imposed by the Company.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Is in Conflict with That of Another United States Court of Appeals and with Those of the National Labor Relations Board.

The decision of the court in this case, narrowly stated, holds that the operation of the doctrine of condonation in the situation of an individual whose employment relationship is terminated prior to the condonation does not in and of itself restore the individual to the status of an employee, entitled to all the rights of one in the employer-employee relationship, but that instead formal contract principles of offer and acceptance are applicable and controlling. In articulating this rule, the court below distinguished the situation of an employee whose status had not been terminated prior to condonation:[4]

> Thus . . . if the employment relationship was, in fact, terminated before the alleged condonation, something additional must be done by the former employee, in response to the Company's reemployment offer, in order to reestablish the employer-employee relationship. If, however, the employer-employee relationship has not been terminated and the employee seeks to return to work, as is the conventional fact pattern in labor condonation cases, then the employer's offer for the worker to return to work may be determinative. 509 F.2d at 855.

This decision is in direct conflict with the decision of the United States Court of Appeals for the Second Circuit in *Confectionery & Tobacco Drivers & Ware. U.* v. *N. L. R. B.*, 312 F.2d 108 (2d Cir. 1963). That case, like the present, involved a lawful severance of the employee relationship for cause prior to the condonation of the misconduct. In that case a group of dissident employees, dissatisfied with their union, demanded

4. This fact, *inter alia*, distinguishes several of the cases discussed in the court's opinion, e.g. *Packers Hide Association* v. *N. L. R. B.*, 360 F.2d 59 (8th Cir. 1966), and *N. L. R. B.* v. *Community Motor Bus Company*, 439 F.2d 965 (4th Cir. 1971).

that the company not enforce a valid union security clause against two employees. When the company refused, the group walked off the job in protest, in violation of the no-strike clause of their contract. The following morning the striking employees sought to end their walkout and return to work but were told that they had been fired. The discharged employees began picketing the plant and the company filed suit to enjoin the picketing. In a court hearing approximately a week later, the company's attorney announced that the parties had reached agreement to end the picketing and return all "strikers" to work. When the individuals reported for work, however, the company declined to reinstate six of them because of asserted misconduct unrelated to the strike and, together with three others, also because their jobs had been filled. The court granted enforcement of the Board order finding this refusal unlawful:

> Upon these facts we find substantial evidence to support the Board's conclusion that [the Company] . . . condoned the prior unlawful actions of the striking employees. Condonation requires a demonstrated willingness to forgive the improper aspect of concerted action, to "wipe the slate clean." After a condonation the employer may not rely upon prior unprotected activities of employees to deny reinstatement to or otherwise discriminate against them. . . . (312 F.2d at 113)

More significant to this case, however, was that court's rejection of the company's argument that it should be excused from reinstating the individuals because they had not carried out their end of the bargain. To this contention the court tersely responded that the company "misconceive[d] the nature of the condonation principle, which, reflecting a clear public interest in the prompt settlement of labor disputes, is more akin to the doctrine of waiver than to the technicalities of contract law". 312 F.2d at 113.

Although the court there did not address itself to the specific fact of the prior discharge, the Board, in the decision which

was on review in the court, did. *M. Eskin & Son,* 135 NLRB 666 (1962). The Board succinctly stated:

> Condonation indicates an employer's willingness to "wipe the slate clean" and to continue the employer-employee relationship notwithstanding the fact that events occurred which would have justified its termination, and notwithstanding the fact that it was at one point terminated because of such events. 135 NLRB at 667.

Thus, both in the case at bar, in *Eskin* and in other cases as well, the Board has demonstrated that its view on this issue is identical to that of the Second Circuit. It is, of course, axiomatic that the Board's interpretation and application of the provisions of the Act, as explicated in its decisions, is entitled to great weight, as it is the agency charged with the administration of the Act. *N. L. R. B.* v. *Coca-Cola Bottling Co.,* 350 U. S. 264, 269 (1956); *Udall* v. *Tallman,* 380 U. S. 1, 16-7 (1965); *Griggs* v. *Duke Power Co.,* 401 U. S. 424, 433-34 (1971). And on this particular issue, the Board's position is one of long standing, going back as far as 1949. In *E. A. Laboratories, Inc.,* 86 NLRB 711 (1949), enf'd, 188 F. 2d 885 (2d Cir. 1951),[5] cert. denied, 342 U. S. 871 (1951), the Board was confronted with a situation involving prior discharged employees, and found no difficulty in ordering reinstatement based on the doctrine of condonation:

> [W]e conclude that when [company] President Auferio announced that "these people can come back to work, ". . . the Respondent waived its prior discharge of these union leaders and more active union members, and, like the remainder of the striking employees, they became undischarged strikers whom the Respondent was bound to reinstate upon unconditional application; and that the Respondent's refusal to do so . . . when they applied for reinstatement was therefore unlawful. 86 NLRB at 713.

Thus, contrary to the view of the Eighth Circuit, both the Second Circuit and the Board view the operation of the doctrine

5. It should be noted that the panel enforcing the Board's decision in this matter included Circuit Judges Learned Hand and August N. Hand.

of condonation in a situation such as the instant case as akin to a waiver or rescission of the prior discharge and not in the nature of an offer requiring acceptance as in an ordinary commercial contract case. Once the offer of reemployment is made, the employee-employer relationship thereby is renewed, and the employee entitled to all consequences which flow from that status. The Eighth Circuit, on the other hand, would require some affirmative act of acceptance of the offer. As will be discussed, *infra*, such a doctrine is susceptible to substantial abuse. In any event, however, the conflict is clear, and definitive determination by this Court is required.

2. The Case Is of Importance Because it Is Flatly Contrary to National Labor Policy in an Area of Great Significance.

In addition to the fact of the conflict between decisions of the Courts of Appeals as discussed above, in an area where it is of compelling importance that the rights of both management, unions and individual employees be clearly understood, as the stakes in a strike situation cannot be exaggerated, the decision of the Court of Appeals is of importance for several other reasons.

Most significantly, the decision stands for the proposition that during the course of an unfair labor practice strike, which is a strike occasioned by the employer's own violation of the law, a former employee, offered reemployment, an action which manifestly forgives the prior discharge, may be compelled to accept such reinstatement on the employer's terms and conditions or forever lose his claim to the status of an employee and to all rights flowing from that status even if the employer's terms include abandoning and foregoing protected concerted activity. While some justification from a policy standpoint might be found in a situation where an employer is confronted with an unauthorized work stoppage, or arguably even in an economic strike, there surely can be no justification for such a result when the

strike is itself occasioned by the unlawful actions of the employer.

The force of this argument is underscored in a situation such as that which exists here. The Company in this case, as found by the Administrative Law Judge and as underscored by the court, offered reemployment to these individuals only on the condition that they *immediately cease picketing and commence working*. This offer, the court points out, was not accepted. Yet in this off-hand disposition of the case, the court below has sanctioned a plainly unlawful action by a company, and not only has approved it *sub silentio,* but more remarkably has permitted this new action to become the vehicle by which the employer is excused from all legal obligations to these employees which arose out of its own unlawful activities! That the conditioning of employment on the dischargees' refraining from engaging in concerted activity protected by Section 7 of the Act, 29 U. S. C. § 157, is patently unlawful is not open to serious dispute. See, e.g., *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177 (1941); *N. L. R. B.* v. *Crean,* 326 F. 2d 391 (7th Cir. 1964); *Standard Aggregate Corp.*, 213 NLRB (No. 25) (1974); *P. B. & S. Chemical Co.*, 148 NLRB 152 (1964). Yet it is the very making of this offer, and the dischargees' failure to act upon it, which the court below has ruled excuses the Company from now reinstating these men. The majority opinion, therefore, authorizes an employer such as the Company, whose pervasive and flagrant unfair labor practices have provoked a strike of its employees, to solicit prospective employees, including those who were former employees and therefore can well be said to have a greater interest in the Company, with offers unlawfully conditioned upon abandonment of their Union. If the offerees accede to the conditions, the Company's illegitimate effort to "break" the legally protected strike will be materially advanced. If the illegal offers are not accepted, the Company is in no worse position than if they had not been made. Totally left abandoned is the former employee who, while his earlier discharge is plainly

forgiven, cannot see his way clear to abandon his Union and forswear his statutory rights. Thus, the majority opinion adopts a view of the law which may actually *encourage* an employer—who has nothing to lose, and a great deal to gain in this situation—to commit further unfair labor practices in the hopes of avoiding the economic consequences of his past violations of the law.

To require an individual to manifest his acceptance of such an illegal offer by abandoning his statutory right to engage in concerted conduct or otherwise to lose rights which should be his once his past discharge is rescinded is not only inconsistent with, but totally abhorrent to, the national labor policy. "Such a [result] . . . violates the spirit and purpose of Act in that it is calculated to stimulate and aggravate ill-feeling between management and employees rather than promote industrial peace". *Packers Hide Association* v. *N. L. R. B.*, 360 F. 2d 59, 63 (8th Cir. 1966).

3. If Acceptance Is Required, National Labor Policy Dictates That in the Instant Situation, it Can Be Manifested by Continued Participation in the Unfair Labor Practice Strike.

If in fact formal acceptance is required, as the court below has held, and as suggested by at least one other Court of Appeals,[6] then in the circumstances of an unfair labor practice strike such acceptance, at least insofar as prior discharged employees are concerned, must be found, as Judge Lay in dissent has suggested, in the continued participation in the strike.

In a practical sense, there is no other reading which can be given to such conduct, and the national labor policy surely cannot permit any other result. Participation in the strike is a protected *employee* activity, and by continuing to picket former dischargees who have been offered reemployment conditioned

6. See *N. L. R. B.* v. *Community Motor Bus Company*, 439 F.2d 965 (4th Cir. 1971).

on an abandonment of their union and their statutory rights must be construed as having resumed the status of employees, entitled, as are all other striking employees, to reinstatement upon unconditional offer. *Mastro Plastics Corp.* v. *N. L. R. B.*, 350 U. S. 270 (1956). Any other result sanctions continued unlawful activity, and penalizes only innocent employees whose past misconduct has been forgiven.

CONCLUSION.

Petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

IRVING M. KING,
ROBERT H. NICHOLS,
RUSSELL WOODY,
One IBM Plaza,
Chicago, Illinois 60611,
Attorneys for Petitioner.

Of Counsel:
COTTON, WATT, JONES, KING & BOWLUS,
One IBM Plaza,
Chicago, Illinois 60611.

APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 74-1304

National Labor Relations Board, *Petitioner*,

vs.

The Colonial Press, Inc., *Respondent*.

On Application for Enforcement of an Order of the National Labor Relations Board.

Submitted: October 17, 1974
File: January 17, 1975

Before GIBSON, Chief Judge, LAY and STEPHENSON, Circuit Judges. GIBSON, Chief Judge.

The National Labor Relations Board petitions, pursuant to Section 10(e) of the National Labor Relations Act as amended, 29 U. S. C. § 160(e), for enforcement of its decision and order[1]

1. The Board's order directed the respondent Company *inter alia* (1) to cease and desist from discouraging union activity or interfering with employees' § 7 rights by means such as threatening and interrogating its employees, telling them not to talk with picketers, creating the impression of surveillance of employee union activity, or otherwise; and (2) to offer designated unfair labor practice strikers reinstatement to their former positions without prejudice to seniority or other rights, dismissing, if necessary, any employees hired as replacements, and to make the strikers whole for any loss of pay suffered.

issued November 30, 1973, and reported at 207 N. L. R. B. No. 114 (1973). Local 203, Graphic Arts International Union, AFL-CIO, the charging party in the proceeding before the Board, was granted leave to intervene. In its decision the Board ordered reinstatement of nine persons categorized as unfair labor practice strikers. Six of the persons ordered to be reinstated had previously been lawfully discharged on August 21 and 22, 1972, for engaging in "long union meetings on company time." Unfair labor practice charges filed on their behalf were later found by the NLRB Regional Director and General Counsel to be without merit and were dismissed. The Company, on this appeal, is resisting enforcement of only that part of the Board's order relating to reinstatement of the six workers lawfully discharged.

The organizational campaign from which this dispute arose commenced in late 1971 and continued into 1972. It concerned an organizational unit of nine employees in the pressroom of the Company's Omaha, Nebraska, printing plant. The campaign was accompanied by employer conduct which was found by the Board in a prior proceeding to be violative of §§ 8(a)(1) and (3) of the Act.[2] On August 23, 1972, the pressroom employees, including those who had been lawfully discharged, commenced a strike against the Company in response to those unfair labor practices. Replacements were hired by the Company. The Board eventually found that the Company committed further unfair labor practices during that strike, consisting of telling employees to quit talking to the strikers, bad-mouthing the Union, engaging in surveillance of employees who talked to the picketers, and telling the employees that the Company

2. In its prior order, reported as *The Colonial Press, Inc.*, 204 N. L. R. B. No. 126 (1973), the Board found that the Company had violated § 8(a)(1) by interfering with, restraining, and coercing employees in the exercise of their § 7 rights when it made anti-union warnings, eliminated overtime work, and unilaterally changed rules. The Board also found that the Company had violated §§ 8(a)(1) and (3) by discriminatorily discharging employees because of their union activity.

would never sign a contract with the Union. During the course of the strike several of the lawfully discharged pressmen were asked by Company officials or straw bosses to come in to talk to the Company about going back to work. Most common among their invitations were statements such as, "My door is always open; any time you want to come down and talk to me you're welcome."

A contract agreement was finally reached between Company and Union in February, 1973. The Union, in two letters, promptly requested unconditional reinstatement of all strikers, including the six workers previously discharged for cause. When the strikers and former employees reported for work on February 23, the company president, Mr. Swoboda, refused to reemploy the six lawfully discharged workers. He told them they had been replaced, but offered to consider their applications for employment on a preferential basis if they wished to file them. In response, charges were filed alleging company unfair labor practices in violation of §§ 8(a)(1) and (3) of the Act. The Union complained that certain employees were threatened, and, without distinguishing between strikers and dischargees, claimed that the Company refused to reinstate unfair labor practice strikers and thereby discriminated against them because of their union activity.

The Administrative Law Judge concluded that the Company had in fact violated Section 8(a)(1) of the Act by coercively interrogating and threatening certain employees,[3] thus inhibiting their rights to engage in concerted activity under Section 7 of the Act. The judge further determined that although the Company's § 8(a)(1) violations had not prolonged the strike, its previous unlawful practices had in fact caused it. Thus, it was an unfair labor practice strike and those who were unfair labor practice strikers were entitled to reinstatement and back pay from the date they requested it. However, the judge also

3. Bernard Nice and Tom Murtaugh (a bindery employee outside the pressmen's bargaining unit).

determined that because the six lawfully discharged workers were no longer employees and hence not unfair labor practice strikers, they were not entitled to reinstatement. In so doing, the judge rejected the Union's argument that the Company had condoned or forgiven the six lawfully discharged workers' misconduct by asking them to return to work, and that the six had thereby regained the status of employees who were on strike in response to the employer's unfair labor practices, having refused its invitations to return to work.

On appeal the Board affirmed the Administrative Law Judge's rulings, but, disagreeing with his findings on the issue of condonation, additionally found that the Company violated §§ 8(a)(1) and (3) by refusing to reinstate all strikers. The Board concluded that various informal statements made by Company managers were "unmistakable offers of reemployment and clear evidence of condonation by [the Company] * * * of the misconduct which had given rise to the earlier lawful discharges." The Board rejected as insignificant factual distinctions drawn by the Administrative Law Judge between the instant case and prior cases of alleged postdischarge condonation. To draw such distinctions, the Board commented, would "invite abuses of the purposes of the Act and an unwarranted dilution of the doctrine of condonation."[4] The Board concluded that statements by Company representatives inviting the strikers to return to work rescinded their previous discharges and waived the Company's right to rely on the discharge-provoking misconduct as a basis for denying reinstatement. In short, the Board concluded that

4. The decisions in *Confectionery & Tobacco Drivers & Warehousemen's Local 805* v. *N. L. R. B.* [*M. Eskin & Son*], 312 F. 2d 108 (2d Cir. 1963), and *N. L. R. B.* v. *E. A. Laboratories, Inc.*, 188 F. 2d 885 (2d Cir. 1951), were distinguished by the Administrative Law Judge (1) because they involved broken strike settlement agreements to which workers had responded, reestablishing their employment relationships; or (2) because they, along with most conventional condonation cases, may have involved only "tactical" discharges which in fact did not terminate employment, while the discharges in the instant case were true discharges which did terminate the six workers' status as employees.

the Company's statements reestablished an employment relationship between the Company and the six workers, so that the workers might enjoy the status of unfair labor practice strikers who are entitled to reinstatement.

I. Section 10(b).

The Company argues, as a preliminary point on appeal, that the Board erred in considering evidence of events which occurred more than six months before the filing of the instant charges, March 6, 1973. It argues that Section 10(b) of the Act, 29 U. S. C. § 160(b), prevents the Board from labeling the strike as an unfair labor practice strike because that determination must rest upon evaluation of Company conduct which occurred before the six-month limitations period. Section 10(b) was enacted for the purpose of stabilizing existing bargaining relationships by barring "litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused' * * *." *Machinists Local 1424* v. *N. L. R. B.*, 362 U. S. 411, 419 (1960). Those purposes would not be advanced by adoption of the Company's argument in the instant case.

Granted, the Company's unfair labor practices which caused the instant strike occurred prior to the § 10(b) limitations period. Those practices were themselves fully recorded in litigation and declared by the Board to be violations of the Act.[5] This case fits within the first situation discussed in *Machinists Local 1424* v. *N. L. R. B.*, *supra* at 416-17.[6] The Board's ruling that the

5. *The Colonial Press, Inc.*, 204 N. L. R. B. No. 126 (1973).

6. As noted in *Machinists Local 1424, supra* at 416:

> It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter,

instant strikers were protesting unfair labor practices could not be said to be "inescapably grounded on events predating the limitations period * * *," *Machinists Local 1424, supra* at 422, as the current complaint rests on failure to reinstate unfair labor practice strikers. Otherwise, the Board would never be able to punish an employer's refusal to reinstate unfair labor practice strikers after a strike lasting more than six months and in which the employer's conduct complained of occurred before and after but not during the strike. *N. L. R. B.* v. *Brown & Root, Inc.*, 203 F. 2d 139, 145-46 (8th Cir. 1953).

II. Condonation.

On the condonation issue, we think the Board has expanded and stretched that concept beyond its basic purpose and proper utility. The principle of waiver by condonation used in the context of labor relations is that, if after an employee commits acts of misconduct lawfully justifying his discharge, and thereafter the employer, fully cognizant of the acts, agrees not to discipline him, the employer may not thereafter rely on the same misconduct as the basis for discharging or refusing to reinstate the employee. Thus, the doctrine is properly invoked "only where there is clear and convincing evidence that the employer has completely forgiven the guilty employee for his misconduct —and agrees to a resumption of [the] company-employee relationship as though no misconduct has occurred." *Packers Hide Association* v. *N. L. R. B.*, 360 F. 2d 59, 62 (8th Cir. 1966).

Condonation may not be lightly presumed. *Plasti-line, Inc.* v. *N. L. R. B.*, 278 F. 2d 482, 486-87 (6th Cir. 1960); *N. L. R. B.* v. *Marshall Car Wheel & Foundry Co.*, 218 F. 2d

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unfair labor practices. [In the instant case, these were the Company's refusals to rehire the strikers.] There, earlier events [the prior unfair labor practices] may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events.

(Footnote omitted.)

409, 414 (5th Cir. 1955). Thus, to order reinstatement on the basis that an employer has condoned an employee's prior misconduct, the record must contain clear and convincing evidence that the employer has in fact agreed (1) to forgive the misconduct and "wipe the slate clean," and (2) to resume the former employment relationship with the employee. Moreover, resumption of the employment relationship necessarily rests on a mutual agreement. *N. L. R. B.* v. *Community Motor Bus Co.*, 439 F. 2d 965, 968 (4th Cir. 1971); *see N. L. R. B.* v. *Cast Optics Corp.*, 458 F. 2d 398, 404-05 (3rd Cir.), *cert. denied*, 409 U. S. 850 (1972). Thus, as also found by the Administrative Law Judge, if the employment relationship was, in fact, terminated before the alleged condonation, something additional must be done by the former employee, in response to the company's reemployment offer, in order to reestablish the employer-employee relationship. If, however, the employer-employee relationship has not been terminated and the employee seeks to return to work, as is the conventional fact pattern in labor condonation cases, then the employer's offer for the worker to return to work may be determinative.

Therefore, in applying the condonation doctrine it is necessary to determine whether, before and after the employer's alleged condonation, the worker was in fact an "employee" within the meaning of the Act.[7] If he was not, then something evidencing the employee's acceptance is needed—in addition to the employer's agreement—to preclude the employer from refusing to

7. Under 29 U. S. C. § 152(3) the term "employee" includes:

> [A]ny employee * * * not * * * limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, *and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute* or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *. (Emphasis added.)

Even under the Act, whether or not a worker is an "employee" is *inter alia* a contract issue, and thus rests on evidence of the parties' mutually manifested intent.

reinstate him.[8] In the normal predischarge condonation setting,[9] however, such acceptance by the employee is not, strictly speaking, required because he is still an employee.

In applying these principles to the instant case, we think the Board's order is unrealistic as it exaggerates the significance of the discharged employees' picketing and the somewhat general and ambiguous statements of the Company's representatives soliciting some of the dischargees to come in and talk to them about reemployment. The conversations appearing most frequently in the record utilized the phrase, "the door is always open." This and similar communications can at best amount only to preliminary invitations to renegotiate reemployment. Obviously, in the context of the strike and the picketing the Company implied that to return to work at the time would be to renounce the Union. The Company made no unconditional offers for dischargees to return to work without penalty. These instances fall far short of constituting positive acts manifesting both forgiveness and agreement to resume the former employment relationship. *N. L. R. B.* v. *Community Motor Bus Co.*, 439 F. 2d 965 (4th Cir. 1971); *Packers Hide Association* v. *N. L. R. B.*, 360 F. 2d 59 (8th Cir. 1966); *Plasti-line, Inc.* v. *N. L. R. B.*, 279 F. 2d 482 (6th Cir. 1960). An enlargement of the salutary condonation principle to embrace such nebulous and preliminary overtures toward former employees would be detrimental to the purposes of the National Labor Relations Act to promote more harmonious labor relationships between em-

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8. The cases finding condonation after discharge contain evidence of acceptance by the workers in the form of some affirmative action in response to an unequivocal company settlement offer. *Jones & McKnight, Inc.* v. *N. L. R. B.*, 445 F. 2d 97, 101-02, 104 (7th Cir. 1971); *Confectionery & Tobacco Drivers & Warehousemen's Local 805* v. *N. L. R. B.* [*M. Eskin & Son*], 312 F. 2d 108, 112-13 (2nd Cir. 1963); *N. L. R. B.* v. *Aladdin Industries, Inc.*, 125 F. 2d 377, 382 (7th Cir.), *cert. denied*, 316 U. S. 706 (1942).

9. *Union Twist Drill Co.*, 124 N. L. R. B. 1143, 1144 (1959); *The Carey Salt Co.*, 70 N. L. R. B. 1099, 1100 (1946).

ployers and employees, aside from ignoring contract principles relevant to establishing an employer-employee relationship.[10]

The Company's refusal to reemploy the six dischargees falls short of violating §§ 8(a)(1) and (3) of the Act in two imporant respects. First, as of August 22, 1972, the discharged workers were not employees of the Company and they did nothing thereafter to reestablish their employment prior to demanding reinstatement in February, 1973. Their joining of the picket line prior to the Company's alleged offers of reemployment cannot be considered as acceptance of the Company's offers. And the offers, if made at all, and in their most liberal interpretation, could only be to come back to work for the Company on the Company's terms—one of the terms being that persons accepting employment would work and not merely picket. Irrefragably, no "incantation of carefully constructed legal phrases," to use the Board's language, is needed for a worker to manifest his willingness to work.

Second, the preliminary invitations by Company representatives for the six dischargees to "come in to talk" cannot be characterized as unconditional offers of reemployment. This court recognizes in *Packers Hide Association* v. *N. L. R. B.*, *supra* at 63, that,

> [C]ondonation may not be lightly presumed from mere silence or equivocal statements, but must clearly appear from some positive act by an employer indicating forgiveness and an intention of treating the guilty employees as if their misconduct had not occurred.

The Board's conclusion that the Company offered unconditional reemployment and condoned the six employees' misconduct, thus overruling the decision of the Administrative Law Judge, is not supported by substantial evidence on the whole

10. The Second Circuit's comment that "the condonation principle * * * is more akin to the doctrine of waiver than to the technicalities of contract law," *Confectionery & Tobacco Drivers and Warehousemen's Local 805* v. *N. L. R. B.* [*M. Eskin & Son*], 312 F. 2d 108, 113 (2d Cir. 1963), should not be taken as an invitation to disregard contract principles entirely.

record, The Company's making of informal overtures and eventual refusal to rehire the six dischargees was not fairly described by the Board when it characterized it as "misleadingly agreeing to return its employees to work and then taking disciplinary action for something already forgiven."

The Board's reliance on *N. L. R. B.* v. *New England Tank Industries, Inc.*, 302 F. 2d 273 (1st Cir.), *cert. denied*, 371 U. S. 875 (1962), to supply the basis for its condonation theory is not persuasive. In *New England Tank*, which was essentially a discriminatory refusal to hire 49 of a predecessor's work force, the company had already offered three predecessor employees employment and the offer of employment had been accepted. Before the successor took over the operations the three men who had accepted employment learned of the discriminatory refusal to hire 49 of their co-workers because of union affiliation and joined in an unfair labor practice strike. The court held that since the three men had accepted the work offer and were working on September 30th and would have worked on October 1st, when the successor company took over, except for the protest of that company's unfair labor practices, these three men were employees and should properly be considered unfair labor practice strikers. The essential difference between *New England Tank* and the instant case is that in *New England Tank* the employees had not been discharged; rather, they had accepted employment and then, after finding out that their former co-workers were discriminatorily being denied employment because of union affiliations, joined in the unfair labor practice strike. In the instant case, at the time of the alleged condonation the six workers had been discharged and no longer enjoyed the status of employees, nor had they accepted any offers of reemployment—such as the offers might have been. The mere offer of possible reemployment, without acceptance, could not have transformed the six dischargees into strikers and then, in turn, into unfair labor practice strikers entitled to reinstatement. The Company, after having lawfully dis-

charged the six workers, stood absolved from any duty to reemploy them, and in refusing to do so was "simply exercising its normal right to select its employees." *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 259 (1939).

We are unwilling to accept the dissent's argument that acceptance of the offers of reemployment, if made, may be found in the contained picketing by the dischargees. The Company was obviously looking for employees to maintain its production and as all of its "offers" were refused it had to hire new employees to take the place of those discharged and on strike. Assuming, *arguendo*, that offers of reemployment were made to the dischargees, acceptance in these circumstances could only be accomplished by returning to work. It adds nothing but rhetoric to the analysis of this situation to say that in doing so they would be strikebreakers. So would anyone hired by Colonial as replacements whether previously employed there or not. The dischargees were not employees nor strikers, having lost their employment relationship with the Company, but unemployed workers having no greater rights under the Act than any other unemployed worker wishing to work for Colonial. The dissent would create a new status, separate from employees and strikers, of pickets for pay. While we do not wish to nor do we in this opinion require the "incantation of carefully constructed legal phrases" to determine a worker's rights under the Act, neither do we think an employer must adopt and maintain an attitude of unmitigated hostility towards discharged employees to avoid legal penalties upon a refusal to rehire them.

Enforcement of the Board's order finding the Company's refusal to reinstate the six lawfully discharged workers[11] to be in violation of §§ 8(a)(1) and (3) of the Act is denied. In all other respects the Board's order is granted enforcement.

Lay, Circuit Judge, dissenting.

I respectfully dissent.

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11. They are: Gary Baker, David Birdsong, Wayne Blenden, Gilbert Classen, Jeff Louden, and Russell Sass.

The majority opinion adopts the Administrative Law Judge's reasoning that there was no acceptance of the offers of reemployment and therefore there was no restoration of employee status to the discharged strikers. This reasoning is fallaciously premised on the supposition that the offer of reemployment sought a bilateral contract, *i.e.*, a promise for a promise. On the contrary, the employment relationship between the employees and the company is formed by a unilateral contract, *i.e.*, the promise to pay for the performance of services. The offers of reemployment sought acceptance by the resumption of employee services and did not depend on any formal bilateral agreement. Yet under the Administrative Law Judge's rationale, as adopted by the majority, the discharges were required first to vocally accept employment with the illegal condition of denouncing the union before they could legally assume the status of an employee[1]. Under the facts presented this requirement is highly

1. Contrary to the majority's view the condonation, that is, the forgiveness of the dischargees' prior misconduct, is clearly supported by substantial evidence on the record as a whole. Even the Administrative Law Judge credited the statements made as clear manifestation that the dischargees were still acceptable as employees and that their jobs were open to them *provided* they renounced the union. The statements made were not, as suggested by the majority, simply a casual suggestion that the "door was always open" for negotiations. The Brief of the Intervenor, Local 203, Graphic Arts International, well summarizes the substantiality of this evidence:

> —Bernard Nice, a striking employee and Union steward, testified that he was asked by Don Nice, about a month after the strike began on one of some fifteen similar occasions, to "come back in and bring your guys with you"; Don Nice admitted both the specific statement and the fact of his frequent discussions with Bernard.
>
> —Bernard Nice testified that, in January, 1973, Don Nice told him in an Omaha bar, following a reference by Bernard to the fact that eight individuals were on strike, that he (Bernard) could tell the other strikers that "there was jobs open, come on in, the door was open"; that testimony is unchallenged.
>
> —Russell Sass testified that, in late September or early October, Don Nice told him that "the door was always open"; Nice admitted that he "possibly could have" made the statement.

technical and unrealistic. It ignores the reality of the factual situation in which the offers were tendered.

As the Board so effectively stated in its opinion:

> [T]he rationale offered by Respondent and adopted by the Administrative Law Judge would require persons such as those involved here either to forsake their legitimate protests evidenced by their picketing activity and to become strikebreakers, or else would require them to be so counseled by those trained in the law as to carefully recite that they were willing to resume employee status but that they were continuing to engage in concerted activity in support of the protests of the work force against the em-

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David Birdsong testified that, the day following his discharge, Richard Henderson called his home and left a message that Birdsong's job was there and all he had to do was tell the Company what he wanted within reason in terms of wages; this evidence is unrebutted.

—Even adopting Jay Swoboda's version of the conversation between he [sic] and Birdsong in the Marleybones Bar a week after the strike began, Swoboda told Birdsong that he could make up his own mind whether he wanted to stay out with the strikers or come back into the plant, asked Birdsong to call him when he made up his mind and offered to pay for any damage which might be done to his car if he decided to return to work. [Swoboda emphatically stated that at the time of his conversation with Birdsong he definitely had the right to come back to work if he wanted to.]

—Birdsong testified that Swoboda talked to him on the picket line about a week after the beginning of the strike and told him his job was there and all he had to do was go in and talk to him (Swoboda) about it; this conversation is not denied by Swoboda.

—Birdsong testified without contradiction that two or three weeks after the strike began, Richard Henderson spoke to Birdsong and Jeff Louden, and said they could have their jobs back and possibly a raise in pay.

—Birdsong testified without contradiction that, in January, 1973, Keith Kile said to him that he wished Birdsong would come in and talk to him.

—Jeff Louden testified that a few days after the picketing began, Richard Henderson, in one of at least ten such conversations, told him that he could have his job back, and possibly a raise in pay. This testimony was unrebutted.

Brief of Intervenor at 19-20. (Emphasis deleted.)

ployer's unfair labor practices. To force such persons to become strikebreakers would subvert the very purposes underlying the protection afforded to unfair labor practice strikers. To require an incantation of carefully constructed legal phrases seems to us to introduce wholly unnecessary and undesirable formalities and to make artificial our approach to problems of reality and substance. Appendix at 29-30.

Assuming some form of acceptance of the offer of reemployment was necessary, that acceptance can be found in the resumption of the performance of employee functions. An unfair labor practice strike is a valid employee function. Continued participation in such a strike, after the offer of reemployment is made, can signify acceptance if it is accompanied by the mutual understanding that the employee desires to re-establish his employee status. Here, that understanding is readily apparent. There can be little doubt that the employees desired to return to their work *unshackled by any illegal condition that they denounce the union and their protected rights under the Act.* When the offers to reemploy them were made, the men continued as strikers along with the other unfair practice strikers. When the settlement was reached and all strikers offered to return to work the company was well aware that those previously discharged desired to return to their old jobs. The men were all seasoned workers and possessed good jobs; that their continued activity as strikers could be viewed by the employer as only detached and disinterested picketing is highly unreasonable.

The acceptance required by the majority could only be manifested by the dischargees' returning to their jobs and thus becoming strikebreakers. This would deny them their right to protected activity as employees under the Act. They would be denied the right to lawfully protect an unfair labor practice, as the other employees were doing, by lawfully striking. Thus, when the offers of reemployment were made, the action required of the dischargees to demonstrate their assent to resume the status of employees was the assumption of the role of an unfair

labor practice striker rather than that of a working employee. This they did.

To require the discharged employee to do more, to accept the illegal condition and return to work, is to require the employees to forgo their right to strike, guaranteed by § 7 of the Act. This is a clear violation of the Act. *See Standard Aggregate Corp.*, 213 No. 25 87 L. R. R. M. 1273 (September 3, 1974).

I find the Board's analysis sound. I would enforce in full the Board's order.

A true copy.

Attest:

Clerk, U. S. Court of Appeals,
Eighth Circuit.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
September Term, 1974

74-1304 National Labor Relations Board, *Petitioner,* *vs.* The Colonial Press, Inc., *Respondent.* Local 203, Graphic Arts International Union, AFL-CIO, *Intervenor.*	Application for Enforcement of Order of National Labor Relations Board

The Court having considered petition for rehearing en banc filed by counsel for intervenor and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied by an evenly divided Court. Judges Lay, Heaney and Bright voted to grant the petition. Judge Ross took no part in the consideration of the petition.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 26, 1975.

APPENDIX C.

UNITED STATES OF AMERICA
Before the National Labor Relations Board

The Colonial Press, Inc. and Graphic Arts International Union, Local 203, AFL-CIO (formerly known as Lithographers and Photoengravers International Union Local No. 203)	Case 17—CA—5533

DECISION AND ORDER.

On July 24, 1973, Administrative Law Judge George J. Bott issued the attached Decision in this proceeding. Thereafter, all parties filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge with the following modifications.

We agree with the Administrative Law Judge that the Respondent violated Section 8(a)(1) through an unlawful threat, interrogation, and other like conduct by certain supervisors. However, we also find, contrary to the Administrative Law Judge, that Respondent's refusal to reinstate the strikers and pickets in February 1973 violated Section 8(a)(3) and (1).

The Respondent discharged seven employees on August 22, 1972. Six of the seven discharges were for lawful reasons. The remaining discharge, that of Bernard Nice, was found unlawful in a previous case.[1] On August 23, the Union called a strike, which the Administrative Law Judge found to be an unfair labor practice strike.[2] We agree with that finding for reasons set forth in the Administrative Law Judge's Decision.

The more difficult issue before us is whether the six persons found to have been lawfully discharged became, through the events hereinafter described, entitled to the reemployment rights normally accorded to unfair labor practice strikers, or whether they continued throughout the series of events herein to be dischargees having an insufficient nexus of employment with Respondent to be considered unfair labor practice "strikers."

As set forth in the Decision of the Administrative Law Judge, whose findings of fact we adopt, Respondent on various occasions during the strike made statements to the dischargees which can only be construed as offers of reemployment. Thus Foreman Nice stated, with respect to the dischargees, "tell them that there was jobs open, just come on in, the door was open." Furthermore, the highest official of Respondent, President Swoboda, told dischargee Birdsong, after complimenting him on his past good work, that "his [Swoboda's] door was always open" and told Birdsong that he would pay for any damages to Birdsong's car and "pick you up from your house, bring you to work, take you home from work anytime."Again, as set forth in the Decision below, Swoboda also advised Birdsong that he was not "locked out," but stated that his job was inside and that all that was necessary for him to do to have it restored to him was to come in and talk with Swoboda. Foreman Henderson also told Birdsong that he and Jeff Louden, another of the dischargees, could have their jobs back, possibly with a raise in wages.

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1. *The Colonial Press, Inc.*, 204 NLRB No. 126.

2. Insofar as the record indicates, there were initially three unfair labor practice strikers—Bernard Nice, Donald Blenden, and Gary Pilcher.

We find these statements to be unmistakable offers of reemployment and clear evidence of condonation by Respondent of the misconduct which had given rise to the earlier lawful discharges. The only question remaining, therefore, is whether, as Respondent argues, the fact that these persons did not accept these offers of reemployment during the strike leaves them in an unprotected position for the reason that they did not act affirmatively to reclaim their status as "employees" and thus remained outside the protection of the Act.

The Administrative Law Judge, distinguishing the facts here from those in *M. Eskin & Son*, 135 NLRB 666, enfd. 312 F. 2d 108 (C. A. 2), and *E. A. Laboratories, Inc.*, 86 NLRB 711, enfd. 188 F. 2d 885 (C. A. 2), held that where, as here, the discharges took place prior to the commencement of the strike the evidence must show a clear acceptance of any offer of employment thereafter made in order for the persons involved to resume their status as employees entitled to the reemployment benefits normally afforded unfair labor practice strikers. He therefore concluded that the six persons here involved had been lawfully discharged prior to the strike, did not accept any offers of reemployment tendered during the strike, and were therefore not striking employees entitled to reemployment rights.

We do not agree. We do not perceive the distinction made by the Administrative Law Judge between the facts of this case and those of *Eskin* and *E. A. Laboratories* to be a meaningful one, and we are of the view that to make such a distinction would invite abuses of the purposes of the Act and an unwarranted dilution of the doctrine of condonation.

We have long construed the Act to confer its protection upon thse who engage in a lawful strike as a means of protest against the commission of unlawful acts under our statute by their employer. Unlike those who strike to secure economic objectives in an atmosphere untainted by employer unfair labor practices, unfair labor practice strikers are not required to assume the risk of being replaced during the strike, but instead are guaranteed a

right to return to their former positions as soon as they unconditionally seek active reemployment. This guarantee, we believe, is essential in order to effectuate the purposes of the Act and the public policies underlying it. Any other construction of the statute would permit an employer, through the successful exercise of his economic power, to recruit replacements for strikers, to defeat, for all practical purposes, the interdictions of the Act against his commission of unfair labor practices and lightly to disregard the protests of his work force against his unlawful acts. It would permit employers to recruit a new group of employees and to leave without employment some or all of those who had been adversely affected by his unlawful infringement of employee rights.

It is true, however, that we make an exception to this guarantee with respect to employees who commit acts, during their employment, or for that matter during the strike itself, which are sufficiently beyond the pale of acceptable employee conduct to warrant the employer's refusal to reemploy them. But we have long engrafted on this exception the qualification that his refusal to reemploy such persons must, demonstrably, be founded upon a genuine concern about the employees' misconduct. Thus, when the employer, by his statements or conduct, evidences a lack of genuine concern about such misconduct by forgiving it or by offering reemployment despite the prior misconduct, we will not permit him subsequently to reassert the condoned conduct as a basis for refusing reemployment. For, once he has indicated that the misconduct on which he relied for severing the employment relationship is no longer his true reason for denying reemployment to those who have protested his unlawful acts, there can remain only the discriminatory reason for denying such reemployment—i.e., retaliation against such persons for having struck or picketed in protest against the employer's unlawful interference with employee rights.

It seems plain enough, upon the facts here, that the statements of the Respondent's foremen and of its chief executive officer

demonstrated a willingness, as we found in *Eskin*, "to 'wipe the slate clean' and to continue the employer-employee relationship notwithstanding the fact that events occurred which would have justified its termination, and notwithstanding the fact that it was at one point terminated because of such events."

Accordingly, at such time thereafter as the six employees evidenced their unconditional willingness to resume such active employment, we can see no justification for any refusal by Respondent to permit them to do so. To hold otherwise would, we believe, be inconsistent with our prior decisions, would dilute the doctrine of condonation in an unwarranted manner, and would invite abuse. For, the rationale offered by Respondent and adopted by the Administrative Law Judge would require persons such as those involved here either to forsake their legitimate protests evidenced by their picketing activity and to become strikebreakers, or else would require them to be so counseled by those trained in the law as to carefully recite that they were willing to resume employee status but that they were continuing to engage in concerted activity in support of the protests of the work force against the employer's unfair labor practices. To force such persons to become strikebreakers would subvert the very purposes underlying the protection afforded to unfair labor practice strikers. To require an incantation of carefully constructed legal phrases seems to us to introduce wholly unnecessary and undesirable formalities and to make artificial our approach to problems of reality and substance.

To our mind, it is more consonant with the realities to conclude upon the facts here that Respondent's statements were such as to evidence a clear intent to continue the employer-employee relationship and in legal effect constituted a rescission of the previous discharges. Having so acted, Respondent is not entitled lawfully later to shift its position again and refuse employment to the persons here involved.

In view of the foregoing, we find that Baker, Birdsong, Wayne Blenden, Classen, Louden, and Sass upon the aforesaid rescission

of their discharges became unfair labor practice strikers; that the Union's requests of February 2, 20, and 23, 1973, that all strikers be reinstated were unconditional offers of reinstatement; and that Respondent's refusal to reinstate pursuant to such requests violated Section 8(a)(1) and (3) of the Act. We reject Respondent's contention that any or all of such persons had effectively been replaced in view of the fact that there is no evidence and no contention that the replacements were hired until after the statements evidencing condonation and the rescission of their discharges had occurred. Since the persons involved were, at the time of their alleged replacement, unfair labor practice strikers, the attempted replacement was ineffective and cannot affect their right to be reemployed.

The Remedy.

As we have found that the Respondent has engaged in various unfair labor practices, we shall adopt the Administrative Law Judge's recommended remedial provisions with the following additions.

In view of our finding that the Respondent unlawfully refused to reinstate the unfair labor practices strikers upon the Union's unconditional application on February 2, 1973, for their reinstatement, we shall order it to offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them by payment to them of a sum of money equal to that they normally would have earned from the date of the Union's unconditional request for reinstatement to the date of Respondent's offer of reinstatement, less any net earnings during such period. The backpay shall be computed in accordance with the remedial relief policies set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing and Heating Co.*, 138 NLRB 716.

In view of the nature of the unfair labor practices committed, and the recent violations found to have been committed by Respondent in 204 NLRB No. 126, we shall order the Respondent to cease and desist from in any other manner infringing upon the rights guaranteed employees in Section 7 of the Act.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, The Colonial Press, Inc., Omaha, Nebraska, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees not to talk with picketing employees.

(b) Creating the impression of surveillance of employee union activity.

(c) Interrogating employees about their union feelings.

(d) Stating to striking employees that other employees would be discharged if they were seen talking to strikers.

(e) Discouraging membership in or activity on behalf of Graphic Arts International Union Local 203, AFL-CIO, or any other labor organization, by refusing to reinstate upon their unconditional application for reinstatement those employees engaged in an unfair labor practice strike, or in any other manner discriminating against such employees in regard to their hire and tenure of employment, except to the extent permitted by the proviso to Section 8(a)(3) of the Act, as amended.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer unfair labor practice strikers Gary Pilcher, Gary Baker, David Birdsong, Wayne Blenden, Gilbert Classen, Jeff

Louden, Russell Sass, Donald Blenden, and Bernard Nice reinstatement to their former positions, or if they no longer exist, to substiantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, any employees hired as replacements for such positions. Respondent shall make whole said unfair labor practice strikers for any loss of pay they may have suffered by reason of Respondent's refusal, if any, to reinstate them, by payment to each of them a sum of money equal to what he would have earned as wages during the period from the date of the Union's first unconditional request for reinstatement of the strikers to the date of Respondent's offer of reinstatement, such loss to be computed in the manner and with interest as in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Omaha, Nebraska, plant copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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3. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. November 30, 1973.

Edward B. Miller,
Chairman

John H. Fanning,
Member

John A. Penello,
Member

National Labor Relations Board

(SEAL)

APPENDIX.

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

WE WILL NOT tell employees not to talk to other employees who may picket our premises or create the impression of surveillance of employee union activities.

WE WILL NOT coercively interrogate our employees about their union views.

WE WILL NOT tell employees that other employees will be discharged if seen talking to striking employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act.

WE WILL NOT discourage membership in or activity on behalf of Graphic Arts International Union Local 203, AFL-CIO, or any other labor organization, by refusing to reinstate in their jobs employees who engage in an unfair labor practice strike, when they unconditionally ask to be reinstated.

WE WILL offer the following employees reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to seniority or other rights and privileges, dismissing if necessary any employees hired to replace them and make them whole for any loss of pay they may have suffered because of our refusal to reinstate them:

Gary Pilcher	Gilbert Classen
Gary Baker	Jeff Louden
David Birdsong	Russell Sass
Wayne Blenden	Donald Blenden

Bernard Nice

The Colonial Press, Inc.
(*Employer*)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 616 Two Gateway Center, Fourth at State, Kansas City, Kansas 64101, Telephone 816—374-4518.

UNITED STATES OF AMERICA,
Before the National Labor Relations Board,
Division of Judges,
Washington, D. C.

The Colonial Press, Inc., and Graphic Arts International Union, Local 203, AFL-CIO (formerly known as Lithographers and Photo-engravers International Union Local No. 203).	Case No. 17-CA-5533

Gerald A. Wacknov, Esq., for the
General Counsel.

Thomas J. Young, Esq. and David R. Flebbe, Esq.,
Omaha, Neb., for the Respondent.

Russell Woody, Esq., of Cotton Watt, Jones,
King and Bowlus, Chicago, Ill., for the
Charging Party.

DECISION.

Statement of the Case.

George J. Bott, Administrative Law Judge: Upon a charge and an amended charge of unfair labor practices filed by the above-named Union on March 6 and May 3, 1973, respectively, against The Colonial Press, Inc., herein called Employer or Respondent, the General Counsel of the National Labor Relations Board issued a complaint on May 9, 1973, alleging that the Respondent had engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act. Respondent filed an answer and

a hearing was held before me at Omaha, Nebraska, on May 30, 1973, at which all parties were represented. Subsequent to the hearing, the parties filed briefs which have been considered.

Upon the entire record in the case and from any observation of the witnesses, I make the following:

Findings of Fact.

I. Jurisdiction of the Board.

Respondent is a Nebraska corporation engaged in the printing business at its plant in Omaha, Nebraska. In the course and conduct of its business operations, Respondent annually sells in excess of $500,000 worth of goods and services, and annually purchases goods valued in excess of $50,000 from suppliers located outside the State of Nebraska.

Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved.

The Union is a labor organization within the meaning of the Act.

III. The Alleged Unfair Labor Practices.

A. The Unfair Labor Practice Strike and Refusal to Reinstate Strikers.

1. Causation

On August 23, 1972, Respondent's pressroom employees went on a strike which was still current at the time of the hearing. The complaint alleges that the strike was caused and prolonged by Respondent's unfair labor practices.[1]

1. The unfair labor practices which it is alleged caused the strike were litigated in Cases Nos. 17-CA-5301 and 17-CA-5300 (-3, -7, -9, -10 and -11). That consolidated proceeding was heard by Administrative Law Judge John F. Funke in January 1973, and on

Robert Powers, president of the Union, testified credibly that on August 5, 1972, employees in the bargaining unit voted to request the International Union to sanction a strike against Respondent. Prior to the vote, which was 6 to 0 in favor of a strike, Carol Nice's discharge, "written reprimands and oral chewing outs," as well as the elimination of overtime were discussed, according to Powers. These issues and Donald Blenden's layoff or discharge, which was also considered, were the basis for the vote to strike, according to Powers' credited testimony, even though he conceded that the status of contract negotiations was also mentioned in the discussion. Although the strike did not take place until August 23, which was the day after Respondent discharged six employees whose terminations were found to be for cause by the General Counsel,[2] I find that the strike was caused in significant part by Carol Nice's termination, withdrawal of overtime, Blenden's severance, and improper warnings and "harassment" of employees, as Powers described Respondent's conduct, although I also believe that the more recent discharges and the unsatisfactory state of contract negotiations must also have been factors which caused the strike to occur when it did.

Respondent contends that since the matters which Powers said caused the strike occurred more that 6 months before the charges in the instant case were filed they are barred by Section

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March 22, 1973, Judge Funke issued a Decision in which he found that Respondent had engaged in a variety of unfair labor practices in violation of Section 8(a)(1), (3) and (5) of the Act prior to the August 1972 strike, including the discharge of Carol Nice; and discriminatory and unilateral issuance of warnings and elimination of overtime, which the Charging Party and the General Counsel contend entered into the Union's decision to go on strike. Judge Funke did not find that Donald Blenden's termination, another factor which it is contended led to the strike, was an unfair labor practice. On July 9, 1973, the Board affirmed Judge Funke's findings and conclusions with respect to Carol Nice's discharge, the warnings and the elimination of overtime, but its also found that Blenden had been discriminatorily terminated. *The Colonial Press, Inc.*, 204 NLRB No. 126.

2. The status of these six persons is discussed *infra*.

10(b) of the Act and may not be considered in this proceeding. I find no merit in this position. As indicated, these matters were litigated in the prior proceeding before Judge Funke on the basis of timely charges. What is being done here is determining the nature of the strike and deciding on the basis of that decision whether Respondent's refusal to reinstate certain strikers is a new unfair labor practice. Since there is also a timely charge alleging a discriminatory refusal to reinstate strikers, there is no bar to considering matters outside the 10(b) period in order to shape the proper remedy of reinstatement.[3]

2. Prolongation.

The complaint alleges five independent violations of Section 8(a)(1) of the Act which General Counsel contends prolonged the strike which began on August 23, 1973. Bernard Nice, whose alleged discriminatory discharge was litigated in the earlier case, testified credibly that sometime in September 1973, while he was picketing, his brother, Donald Nice, foreman of the pressroom, advised him not to talk with bindery employee Murtaugh as he crossed the picket line because Murtaugh would lose his job if seen talking with the pickets. Donald Nice testified that he recalled a conversation with Bernard about Murtaugh, but he was hazy about the details. Based upon Donald Nice's demeanor, I conclude that he actually recalled the threat and was concealing it. I find that his remark to his brother was coercive, regardless of their relationship, and a violation of Section 8(a)(1) of the Act.

3. *N. L. R. B.* v. *Brown and Root, Inc.*, 203 F. 2d 139, 145-146 (C. A. 8); *N. L. R. B.* v. *Lundy Manufacturing Corporation*, 316 F. 2d 921, 927 (C. A. 2). Not only are testimony and findings about the nature of the strike not barred by Section 10(b) of the Act, as the cases hold, but neither is General Counsel relitigating matters already litigated, for the unfair labor practice strike issue was not litigated in the earlier case. It could have been, but it was unnecessary and premature to have done so because the strike was still current and the issue of refusal to reinstate may never have arisen. Cases like *Monroe Feed Store*, 112 NLRB 1336 and *New Enterprise Stone and Lime Company, Inc.*, 176 NLRB 586, cited by Respondent, are not in point.

Tom Murtaugh testified that about 2 months after the strike commenced Grotzinger, bindery foreman, sent him to President Swoboda's office. On the way he met Kile, Respondent's production manager, who asked him if he would like to work in the pressroom. When Murtaugh replied that he would not scab by taking a striker's job, Kile said, "Yes, I see you are still out there talking to guys on the picket line." Murtaugh explained that he was friendly with the pickets and what he did on his own time was his private business.

When Murtaugh entered Swoboda's office, Swoboda asked him why he talked with the pickets, and he replied as he had to Kile. According to his credited testimony, Swoboda commented that the Union was bad for the employees and the Company could do more for them if there were no union in the shop. Swoboda asked Murtaugh what his professional goals were and told him that he could come in to see him at any time and talk about a promotion. He added that he could not do this if there were a union, because, with union representation, only the union bargains for the employees and an employee must "take what everybody else takes."

In January 1973, Murtaugh requested Swoboda to transfer him to another department. Swoboda indicated that there were no vacancies in the particular department at the time, but he added that he would keep the request in mind. During their talk, Swoboda again asked Murtaugh why he continued to speak with the pickets and wanted to know what he thought about the strike. When Murtaugh replied that the strikers probably had their "view," as Swoboda had his, Swoboda stated that he would "prefer" that he not speak with them. He also indicated that he would get back to Murtaugh after considering his request for a different job.

President Swoboda basically denied the main thrust of Murtaugh's testimony, but his testimony was vague, occasionally incomprehensible and somewhat contradictory. He said, for example, that he did not ask Murtaugh about his union sym-

pathies or refer to his talking with the pickets, but later he said that on one occasion he did mention "talking to pickets" to Murtaugh, but only to caution him not to tell them anything about company affairs. I do not believe Swoboda's unclear and condensed version of his conversation with Murtaugh, and I find in accord with the latter's testimony.

By interrogating Murtaugh about his feelings toward the strikers and about why he spoke to them, and by requesting him not to speak with them, in a context which included a discussion of a possible promotion and expressions of antiunion anicus, Respondent restrained and coerced the employee in violation of his Section 7 rights.

I find and conclude, as the complaint alleges, that Respondent coercively interrogated an employee, interfered with his statutory rights by coercively indicating that he should not talk to strikers, and created the impression of surveillance of employee union activity, all in violation of Section 8(a)(1) of the Act.

Murtaugh also testified in late November 1972, Foreman Grotzinger spoke to the bindery employees in a group and told them that information about what was going on inside the plant was being transmitted to the strikers and that their "jobs will be on the line" if Grotzinger discovered who had conveyed such information.

Grotzinger testified that, on Production Manager Kile's instructions, he did tell the bindery employees that they should not talk to pickets about "company business," but he denied that he said that their jobs "would be on the line" if his instructions were disobeyed. Grotzinger explained that he understood Kile's instructions to relate to keeping the names of customers who were doing business with Respondent during the strike from the Union because of possible harassment. He said he made this clear to employees, because he told a questioner that it was all right to talk with pickets about other subjects. I was impressed by Grotzinger's sincerity and care in testifying

on this issue, and I find that he did not threaten employees with discharge in violation of the Act, as the complaint alleges.

Although I have found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act during the strike, I cannot find that they had any connection with the length of the strike. The acts of interference, restraint and coercion which Swoboda engaged in were directed toward only one employee, and a nonunit employee at that. Foreman Nice's statement to his brother that Murtaugh could be fired for talking to him and the other pickets, although coercive, hardly reaches the level of an unfair labor practice impeding the settlement of the dispute in the context of the many other issues which have caused the strike to continue. For example, Respondent and the Union signed a labor agreement in February 1973, but when Respondent refused to reinstate all strikers, or other persons who were discharged before the strike who General Counsel contends are also unfair labor practice strikers, an issue to be treated next, the Union continued to picket. I find that the strike has not been prolonged by the unfair labor practices in violation of Section 8(a)(1) of the Act found herein.

3. The refusal to reinstate strikers.

The strike took place on August 23, 1972. As indicated earlier, on August 22, Respondent discharged Wayne Blenden, Gilbert Classen, Jeff Louden, Russell Sass, Garry Baker and David Birdsong, all then employed in the bargaining unit. Although charges of unfair labor practices based on these discharges were filed the Regional Director of the Board dismissed the charges and his actions were sustained by the General Counsel of the Board on appeal.[4]

On February 2, 1973, the Union wrote Respondent, making what it described as "an unconditional offer for everyone to

4. Bernard Nice was also discharged on August 22, but his case was litigated before Judge Funke in Case No. 17-CA-5300-7. Judge Funke's finding that Bernard Nice was discriminatorily discharged was sustained by the Board.

return to work." Although the Union's letter does not specifically name the individuals fired on August 22 whose charges had been dismissed, it became clear from later correspondence between the parties that it was the Union's position that the dischargees were also entitled to reinstatement because they had been offered reinstatement during the strike but had refused it. This appears from the Union's letter to Respondent on February 20, 1973, in which it stated that Baker, Birdsong, Blenden, Classen, Louden and Sass were included in the Union's "unconditional offer to return to work" because they had been made offers of reinstatement by Respondent subsequent to their discharges.[5]

It is the General Counsel's and the Union's position that Baker, Birdsong, Wayne Blenden, Classen, Louden and Sass have the same status as any unfair labor practice striker in regard to reinstatement because Respondent offered them employment after it terminated them for cause, but they refused the offers and joined the strike. The evidence which was offered to support the theory follows:

Bernard Nice, brother of Foreman Nice, testfied credibly that approximately a month after the strike began his brother spoke with him on the picket line and asked him why he did not return to work and bring his "guys" with him. He said that Foreman Nice commented that the Respondent would never sign a union contract and that "we could sign one of our own." Striker Nice told his brother that because the Company had fired the employees, they would stay on strike until a contract was signed.

5. The Union's February 20 letter was in reply to Respondent's letter of February 5 advising the Union, in response to its communication of February 2, referred to above, that the Union's offer was "conditional" since it included the individuals who had been discharged for "illegal" activities and whose discharges were sustained by the Board. On February 21, 1973, the Respondent replied to the Union's letter of February 20 and again took basically the same position that the Union's offer to return strikers to work was "conditional" because it included those persons whose charges of unfair labor practices had been dismissed and their appeals denied.

Bernard Nice said that he had many conversations with his brother to the same effect while picketing during the strike. On one occasion Foreman Nice responded to his chiding him about the Respondent's discharge of eight employees by stating. "Tell them that there was (sic) jobs open, just come on in, the door was open."

Birdsong, one of the August 22 dischargees, testified that he had a conversation with Swoboda, Respondent's president, in a bar shortly after his discharge in which Swoboda stated that he wished that he had not "gone out" because he was a good worker. Swoboda also stated, according to Birdsong, that "his door was always open" if he wanted to come in and talk with him, and he added that he would pay for any damages to Birdsong's car and "pick you up from your house, bring you to work, take you home from work anytime." Birdsong also said that at some place in their discussion Swoboda advised him that he could withdraw from the Union by writing to the Union and requesting it.

Birdsong picketed with a sign which stated, among other things, that the employees had been "locked out." He testified that Swoboda spoke to him on the picket line a week after he had been discharged and advised him that he was not "locked out," but that his job was inside, and that all that was necessary for him to do to have it restored to him was to come in and talk with Swoboda.[6]

Birdsong testified, without contradiction, that a few weeks after he was discharged and began picketing Foreman Henderson told him that he and Jeff Louden, another of the dischargees, could have their jobs back, possibly with a raise in wages.

Birdsong testified that he understood these remarks of management representatives to be offers of employment conditioned on his abandoning the Union.

Jeff Louden also testified, without contradiction, that Henderson spoke with him about reemployment many times while

6. Production Manager Kile twice invited Birdsong to come into the plant and talk with him while Birdsong was picketing.

picketing in the same vein as he had with Birdsong. He, too, said that he considered the words to be offers of employment on condition that he drop the Union. He said he never responded to Henderson's overtures in any way.[7]

Swoboda testified that anything he said to Birdsong in the bar was not intended as an offer of employment. He said that Birdsong was "confused" and uncertain about whether he should return to work or remain on strike. He advised him to make up his mind first and then come and talk to him. He also testified that only he had authority to make offers of employment to those who were picketing and that he had not delegated that authority to Foreman Nice.

Foreman Nice also testified that he made no statements to his brother about returning to work, but he did tell him that his "door was always open." He did not, however, consider this an offer of employment.

Swoboda's testimony about the Birdsong conversation was inconsistent[8] and generally unimpressive. He realized that the "offer" issue was a sensitive area and carefully selected and emphasized parts of the conversation to make it appear that Birdsong, not he, was definitely interested in Birdsong's return to work.

In my opinion, and I so find, both Swoboda and Nice attempted to conceal the main thrust of their talks with employees. Cutting through all the vague explanations about what "my door is always open" means when spoken to a striker, it is clear to me that Swoboda, Nice, and the other supervisors who spoke

7. Russell Sass, another dischargee who picketed, testified that when he mentioned replacements hired by Respondent during the strike to Foreman Nice, Nice said "the door is always open," but he could not remember anything else that was said by Nice or what he replied, if anything. He, too, "assumed" that if he did go to the plant and talk with Nice, the subject of the Union would arise, and he would probably be asked to quit the Union.

8. At one point he flatly stated that Birdsong could have returned to work if he wished, but at another he hedged and added that it would depend on his lawyer's advice and availability of employment.

to pickets like Birdsong, Nice, Sass and Louden were soliciting them to return to their jobs in order to break the strike. Whether or not the men were told that their return was conditioned on abandonment of the Union is not too important. The reality is that Respondent and the strikers and pickets undoubtedly knew their return to work during the strike meant renunciation of the Union in fact. I find that Respondent clearly indicated to the pickets, including those who had previously been discharged for cause, that they would be reemployed if they requested it.

General Counsel argues that since Respondent offered all of the pickets employment, all of them became unfair labor practice strikers entitled to reinstatement on application. Although I have found that offers of employment were made, I must reject General Counsel's contention because the offers were never accepted. The most that can be drawn from the facts surrounding Respondent's overtures to pickets is that it considered them all reemployable despite the prior improper actions of any of them.[9] In this sense, Respondent forgave their misconduct by clearly indicating that they were employable, but it is something else to say that by virtue of the doctrine of "condonation," nonemployees became striking employees.

Employees who engage in misconduct do not automatically lose their employee status but only become subject to discharge. Thus, when an employee tells strikers who have engaged in conduct for which they might properly be discharged that they all may return to work, he condones their prior misconduct and waives his right to terminate them.[10] But in this case Respondent discharged six persons who had engaged in misconduct, thereby severing the employment relationship. The discharges were no longer employees under the Act when the strike took place, and all the offers that Respondent might make to them could not

9. The dischargees had been terminated for engaging in long union meetings on company time.

10. *Wallick & Schwalm Company*, 95 NLRB 1262, 1264; *Dorsey Trailers, Inc.*, 80 NLRB 478, 483.

restore their lost status until they accepted the offers. This none of them did. The best that can be said for those who had been previously discharged and then assisted the Union in striking and picketing is that they are applicants for employment who may not be discriminated against because of their union activities, but this is not what the complaint alleges nor how the case was tried.[11]

In his excellent brief, counsel for the Charging Party concedes that in practically all the cases where the doctrine of condonation has been applied the misconduct has been found to have been condoned prior to discharge, whereas here the individuals were lawfully discharged before they were solicited to return to work.[12] It also appears from the cases that the condonation rule has been applied only in cases of strikers who have engaged in strikes in violation of contract or have been liable to discharge for other misconduct in the course of the strike.[13] No cases have been called to my attention, and to my knowledge there are none, where the facts parallel the facts in this case and where it has been contended and held that employee status legally extinguished is revived by an unaccepted offer of employment.

In two cases, however, condonation was found where there had been a prior severance, or an attempt to sever, the employee

11. The distinction between reinstatement and reemployment is well established. See *N. L. R. B.* v. *Textile Machine Works, Inc.*, 214 F. 2d 929, 933-34 (C. A. 3); *N. L. R. B.* v. *Childs Co.*, 195 F. 2d 617, 619-621 (C. A. 2); *N. L. R. B.* v. *Pennwoven, Inc.*, 194 F. 2d 521, 525-26 (C. A. 3).

12. See for example, *Brantly Helicopter Corp.*, 135 NLRB 1412; *Union Twist Drill Co.*, 124 NLRB 1143; *California Cotton Coop Ass'n.*, 110 NLRB 1494, 1500; *Alabama Marble Co.*, 83 NLRB 1047; *The Carey Salt Co.*, 70 NLRB 1099.

13. Cases cited n. 12, *supra*. See also *Stewart Die Casting* v. *N. L. R. B.*, 114 F. 2d 849 (C. A. 7); *Plasti-Line, Inc.*, 123 NLRB 1471, reversed 278 F. 2d 482 (C. A. D. C.); *N. L. R. B.* v. *E. A. Laboratories, Inc.*, 188 F. 2d 885 (C. A. 2). *American River Constructors*, 163 NLRB 551, involved improper concerted activities engaged in and condoned prior to a refusal to rehire, but it may be viewed as really a "pretext" case.

relationship. In *M. Eskin & Sons,*[14] it appeared that employees struck in violation of a contract and were in effect told that they were discharged when they reported for work on the following day. The employer sought a State court injunction against picketing immediately, and during the proceeding, settlement terms, including reinstatement of all the strikers, were agreed upon, but thereafter the employer refused to reinstate some of the strikers. The Board found condonation and stated:

> Condonation indicates as employer's willingness to "wipe the slate clean" and to continue the employer-employee relationship notwithstanding the fact that events occurred which would have justified its termination, and *notwithstanding the fact that it was at one point terminated because of such events.* (Emphasis supplied.)[15]

In *M. Eskin & Sons,* the Board cited *E. A. Laboratories, Inc.,*[16] where the Board had concluded that when the employer's president had announced in a court proceeding that "these people can come back to work," the employer waived its prior discharge of union leaders and more active union members who had engaged in an illegal strike, and that they became "undischarged strikers" whom Respondent had to reinstate.[17]

Principally on the basis of *M. Eskin & Sons* and *E. A. Laboratories,* it is argued that to make the fact of discharge prior to the strike conclusive would be to make a fetish out of formalism. Although the argument is troublesome, I think the cases are distinguishable on the basis of principle. First of all, both cases involved strike settlement agreements, which it needs no citations to show the Act encourages. Both agreements to return all strikers to work were made in court proceedings involving the labor dispute, and the strikers acted in reliance on the promises to reinstate them. In the instant case there were no

14. 135 NLRB 666. Enf'd. 312 F. 2d 108 (C. A. 2).

15. *Id.* at 667.

16. NLRB 711, enf'd., *N. L. R. B.* v. *E. A. Laboratories, Inc.,* 188 F. 2d 885 (C. A. 2).

17. *Id.* at 713.

mutual promises; as indicated above, no one accepted Respondent's offer.[18] Having agreed to reinstate all strikers, and the strikers having agreed to return to work it is not difficult on the basis of the offer and acceptance to characterize the result as a restoration of "employee status" to the discharged strikers.[19]

A second real difference in the cases is that employers often engage in "tactical discharges" of strikers for reasons which they may or may not later want to rely on at the end of the strike. Not only is it desirable to prevent a striker from easily losing the employee status which the Act promises him if he strikes, but it is not always certain that the employer actually intended to effect a complete severance of employment.[20] In such circumstances there are greater reasons of policy for inferring "condonation" and concluding that a striker's status as an "employee" continues regardless of how his employer characterizes his status during the strike than there is where the employer has been legally discharged before the strike ever began. He was not a "striking employee" when the strike began, and it seems that in balancing the rights of employees to strike against the right of employers to discharge them for cause and to replace them, it should take more than "condonation" or an unaccepted offer of employment to turn a dischargee into a striker and then into an unfair labor practice striker entitled to reinstatement, upon application, even if replacements legally hired must be discharged.

I find and conclude that Baker, Birdsong, Wayne Blenden, Classen, Louden and Sass are not employees on strike because of

18. In *E. A. Laboratories, Inc.*, 80 NLRB 625, 662-663, 673-674, the Trial Examiner found that the strikers accepted the Respondent's offer by going to the plant and that they did this "in reliance" on the employer's promise. In *Carey Salt Company*, 70 NLRB 1099, there was also a strike settlement agreement which was violated by the employer.

19. *Carey Salt Company, supra,* at 1101.

20. In *E. A. Laboratories, Inc.*, 80 NLRB 625, 673, the Trial Examiner thought that the strikers actually had not been discharged and that the employer had engaged in a "tactical manuever" is stating that they were. See also, *Columbia Pictures Ass'n.*, 82 NLRB 568; *Fafnir Bearing Co.*, 73 NLRB 1008; *Home Beneficial Life Ins. Co.* v. *N. L. R. B.*, 159 F. 2d 280 (C. A. 4).

Respondent's unfair labor practices and therefore entitled to reinstatement upon application. I do find, however, that any other persons who struck or joined the strike after it commenced are unfair labor practice strikers.[21]

Since the Union's application to return to work made on behalf of strikers were not unconditional because they included the dischargees, I find and conclude that Respondent did not violate Section 8(a)(3) and (1) of the Act when it rejected them.

Conclusions of Law.

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of the Act.

3. By engaging in the conduct found to be unfair labor practices in section III, A, 2, above, Respondent violated Section 8(a)(1) of the Act.

4. The strike which took place on August 23, 1972, was caused by Respondent's unfair labor practices.

5. Said strike was not prolonged by Respondent's unfair labor practices.

6. Any employee who struck on August 23, 1972, is an unfair labor practice striker who is entitled to reinstatement upon unconditional application for employment.

7. Gary Baker, David Birdsong, Wayne Blenden, Gilbert Classen, Jeff Louden and Russell Sass are not unfair labor practice strikers entitled to reinstatement upon application.

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21. Although the General Counsel alleged in Case No. 17-CA-5300-3, tried before Judge Funke, that Gary Pilcher had been discriminatorily discharged, Judge Funke found that he had not been discharged but had voluntarily joined the strike. It would appear, therefore, that Garry Pilcher is the sole unfair labor practice striker entitled to reinstatement.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, it shall be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[22]

ORDER.

Respondent, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Telling employees not to talk with picketing employees.

(b) Creating the impression of surveillance of employee union activity.

(c) Interrogating employees about their union feelings.

(d) Stating to striking employees that other employees would be discharged if they were seen talking to strikers.

(e) In any other like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

22. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Secion 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Upon application, offer to unfair labor practice strikers reinstatement to their former positions, or if they no longer exist,[23] to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, any employees hired after August 23, 1972, for such positions. Respondent shall make whole said unfair labor practice strikers for any loss of pay they may suffer by reason of Respondent's refusal, if any, to reinstate them, upon request, by payment to each of them a sum of money equal to what he would have earned as wages during the period beginning 5 days after the date on which he applies for reinstatement and terminating on the date of Respondent's offer of reinstatement, such loss to be computed in the manner and with interest as in *F. W. Woolworth Company*, 90 NLRB 289 and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

(b) Preserve and make available to the Board or its agents all payroll and other records necessary to compute the backpay and reinstatement rights of unfair labor practice strikers.

(c) Post at its Omaha, Nebraska, plant, copies of the attached notice marked "Appendix."[24] Copies of said notice, on forms provided by the Regional Director for Region 17, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily posted, and be maintained by it for 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

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23. See fn. 21, *supra*.

24. In the event the Board's Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated at Washington, D. C.

/s/ George J. Bott
George J. Bott
Administrative Law Judge

APPENDIX.

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

WE WILL NOT tell employees not to talk to other employees who may picket our premises or create the impression of surveillance of employee union activities.

WE WILL NOT coercively interrogate our employees about their union views.

WE WILL NOT tell employees that other employees will be discharged if seen talking to striking employees.

WE WILL NOT in any other like or related manner interfere with, restrain or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act.

WE WILL, upon application offer Gary Pilcher reinstatement to his former position and without prejudice to seniority or other rights and privileges, dismissing if necessary any employee hired after August 23, 1972, for such position. In the event we fail to reinstate said employee, we shall make him whole for any loss of pay he may suffer because of our refusal to reinstate him.

The Colonial Press, Inn
(Employer)

Dated ..... By .....
(Representative)

This Is an Official Notice and Must Not Be Defaced by Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 616—Two Gateway Center, Fourth at State, Kansas City, Kansas 66101 (Tel. No. 816-374-4518).